Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	)	WT Docket No. 96-162
	)	
Implementation of Section 601(d) of the Telecommunications Act of 1996, and Sections 222 and 251(c)(5) of the Communications Act of 1934	)	DOCKET FILE COPY ORIGINAL
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314
	)	
Requests of Bell Atlantic-NYNEX Mobile, Inc., and U S WEST, Inc., for Waiver of Section 22.903 of the Commission's Rules	)	

COMMENTS OF AT&T WIRELESS SERVICES, INC.

Howard J. Symons
Donna N. Lampert
Sara F. Seidman
Michelle M. Mundt
Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

202/434-7300

Of Counsel

Cathleen A. Massey
Vice President - External Affairs
Douglas I. Brandon
Vice President - External Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

202/233-9222

October 3, 1996

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	)	WT Docket No. 96-162
	)	
Implementation of Section 601(d) of the Telecommunications Act of 1996, and Sections 222 and 251(c)(5) of the Communications Act of 1934	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314
	)	
Requests of Bell Atlantic-NYNEX Mobile, Inc., and U S WEST, Inc., for Waiver of Section 22.903 of the Commission's Rules	)	

COMMENTS OF AT&T WIRELESS SERVICES, INC.

AT&T Wireless Services, Inc. ("AT&T"), by its attorneys, hereby submits its comments with respect to the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In the Notice, the Commission correctly recognizes that, while dynamic changes are taking place in the telecommunications industry, the fundamental rationale underlying the structural separation requirement for Bell Operating Company ("BOC") provision of cellular service has not materially changed. The BOCs continue to retain their monopoly power in the landline local exchange market and have the incentive and ability to leverage that

dominance into the cellular service market. Over the years, the BOCs' market power has manifested itself in discriminatory interconnection rates and a refusal to pay mutual compensation for the termination of landline-originated traffic. In addition, cross-subsidization between regulated landline and competitive cellular service, which harms both telephone ratepayers and cellular competitors, continues to be a problem.

Although the Commission recognizes this anticompetitive conduct and acknowledges that it is unlikely to abate in the near future, it nevertheless proposes eliminating the structural separation requirement, either immediately or after a short transition period. Such premature action would undermine Congress' and the Commission's objective of fostering competition in the wireless marketplace. Because the BOCs retain their bottleneck control of essential landline facilities, the costs of removing the structural safeguards, at least for in-region commercial mobile radio services ("CMRS"), far outweigh the benefits BOC customers might enjoy through their elimination. The Commission should retain section 22.903 of its rules until the local exchange marketplace becomes competitive.

The Commission's concerns about regulatory parity between cellular and other CMRS, as well as between BOCs and other local exchange carriers ("LECs"), do not require elimination of the structural separation requirements. These concerns are better addressed through extension of the structural safeguards requirements to all CMRS and all Tier 1 LECs. In fact, the benefits of the structural separation requirement will outweigh the costs for all CMRS and all Tier 1 LECs.

If, despite all the evidence to the contrary, the Commission determines that structural separation is no longer required, AT&T urges it to eliminate the rule gradually through a

sunset mechanism. Specifically, the Commission should extend its proposed sunset period to coincide with the sunset period for the separate subsidiary requirement for BOC provision of in-region interLATA services. This would be consistent with the approach taken by the Telecommunications Act of 1996 ("1996 Act") with respect to the BOCs' competitive activities, and better comports with the realities of the marketplace.

Various of the Commission's proposals to soften the structural separation requirement pending its elimination would effectively eviscerate the rule. In particular, the Commission should not adopt its tentative conclusion that a BOC cellular affiliate be permitted to provide in-region "competitive" landline service. This proposal, if adopted, would allow BOCs to circumvent the separate subsidiary requirement by placing exchange innovations and other quality improvements with the affiliate, so that competitors dependent upon BOC facilities will find them increasingly obsolete. Indeed, it is not clear that there would be any reason for an affiliate to provide landline service in competition with the BOC except to circumvent the structural separation rule.

Further, additional nondiscrimination safeguards are also essential to ensure the fair treatment of competitors, to promote competition, and to serve the public interest. In particular, the Commission should narrowly construe the joint marketing provision of the 1996 Act to permit only arm's length, compensatory arrangements. The Commission also should retain its customer proprietary network information ("CPNI") rule, which prevents a BOC from providing valuable information accrued by virtue of its local exchange monopoly to its affiliate or using CPNI in its joint marketing unless it makes the CPNI available on the same terms to all competing providers. In addition, the Commission should specifically

make applicable to CMRS the nondiscriminatory network information disclosure rules it established in its Local Competition Orders. Finally, the Commission must vigorously enforce its accounting safeguards by conducting, at a minimum, annual audits and requiring all Tier 1 LECs to issue a separate set of financial reports, including an income statement, a balance sheet, and a statement of cash flows, for public review on a quarterly basis.

These non-structural safeguards alone are not sufficient to detect LEC discrimination and cross-subsidization and do not provide a reasonable alternative to structural separation requirements. Until the Commission is able to conclude that the incumbent LEC monopoly has been eroded to the extent that the telephone companies are no longer able to leverage their dominance into the CMRS market, the Commission should apply non-structural safeguards in addition to, rather than in lieu of, structural separation requirements.

I. THE COMMISSION SHOULD ADOPT UNIFORM STRUCTURAL SEPARATION REQUIREMENTS FOR THE PROVISION OF ALL CMRS BY ALL TIER 1 LECs

A. Section 22.903 Continues to Serve a Legitimate and Necessary Purpose

In the Notice, the Commission seeks comment on whether the structural separation requirements of section 22.903 of its rules regarding the provision of cellular service[1/] remain necessary to safeguard against the abuse by the BOCs of their market power in the local exchange.[2/] The Notice explicitly acknowledges the continued market power of the BOCs in landline local exchange and exchange access markets,[3/] the specter of

---

1/ 47 C.F.R. § 22.903.

2/ Notice at ¶ 42.

3/ Id.

discriminatory interconnection arrangements and prices,[4/] the potential for anticompetitive cross-subsidization,[5/] and the ability of the BOCs to leverage their market power to compete unfairly.[6/] Based upon its experience to date, as well as the incentives and ability of the BOCs to act in an anticompetitive manner, AT&T strongly believes that if the Commission truly seeks to foster a robustly competitive environment for the provision of cellular services, it must, at a minimum retain the requirement that a BOC provide cellular service only through a subsidiary that is structurally separate from the landline local exchange company. Sound legal analysis and policymaking support such an outcome.

The Commission originally adopted the cellular structural separation rule in an effort to deter BOCs from abusing their local monopolies by cross-subsidizing and denying wireless competitors access to network facilities.[7/] While recognizing that even such a rule would not necessarily reduce the incentives of the BOCs to act in an anticompetitive manner, the Commission properly understood that the rule would make detection of such improper behavior easier.[8/] Significantly, as the Commission points out in the Notice, that market

---

[4/] Id. at ¶¶ 43-44.

[5/] Id. at ¶ 46.

[6/] Id. at ¶¶ 47-49.

[7/] Cellular Communications Systems, 86 FCC 2d 469, 493 (1981) (rule is intended to address serious concerns about the ability of local exchange companies to forestall wireless competition by engaging in "predatory pricing tactics or misallocating the shared costs of cellular and conventional wireline service.")

[8/] Id., 86 FCC 2d at 494.

power still exists today and in fact, will exist for the foreseeable future despite the numerous critical steps that are being taken to promote greater local exchange competition.[9/]

Indeed, one of the principal reasons for enactment of the Telecommunications Act of 1996[10/] was Congress' finding that LECs continue to control local landline bottlenecks.[11/] Today, the overwhelming percentage of the nation's telecommunications traffic, landline and wireless, continues to be funneled through the LECs' local switches and infrastructure.[12/] Accordingly, the LECs retain the ability, as well as the incentive, to provide themselves and their affiliates with unfair advantages over their competitors through discriminatory interconnection practices, cost misallocations, price squeezes, and other improper practices. While the 1996 Act and the implementing orders of the Commission are designed to foster

---

[9/] Notice at ¶ 42.

[10/] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[11/] During floor consideration of the Senate version of the 1996 Act, Senator Lott noted that:

> It is critical to recognize the reason why all of these barriers, restrictions, and regulations exist in the first place -- the so-called bottleneck. Opening the local network removes the bottleneck and ensures that all competitors will have equal and universal access to all consumers.

141 Cong. Rec. S7906 (daily ed. June 7, 1995) (statement of Sen. Lott); see also 141 Cong. Rec. H8289 (daily ed. August 2, 1995) (statement of Rep. Hastert) (noting the "list of areas (such as number portability, dialing parity, interconnection, equal access, resale, and unbundling) that give monopolies their bottleneck in the local loop. We agreed to remove the monopoly power in each and every one of those areas in our bill."); H.R. Rep. No. 104-204, at 49 (1995) ("House Report") ("In the overwhelming majority of markets today, because of their government-sanctioned monopoly status, local providers maintain bottleneck control over the essential facilities needed for the provision of local telephone service.")

[12/] SBC Communications Inc. v. FCC, 56 F.3d 1483, 1491-92 (D.C. Cir. 1995) ("nearly every cellular long distance call must travel across a BOC's landlines in order to reach an IX carrier's network").

competition and ultimately alter the telecommunications marketplace, it would be wholly premature to lift existing safeguards or fail to extend them to other large incumbent LECs on this basis alone.

First, the concern regarding discriminatory interconnection practices that was one of the original justifications for adoption of the structural separation requirements is still valid. As the Commission has documented extensively, the LECs have failed to provide CMRS providers with mutual compensation and nondiscriminatory interconnection rates.[13/] In addition, evidence has indicated that key informational exchanges between BOCs and their affiliates are often not made available to competitors or disclosed to the public.[14/] While vigilant Commission enforcement and oversight, as well as clear Commission directives and other nondiscrimination safeguards, can help alleviate some discriminatory practices, it simply cannot substitute for a structural solution that would better deter discriminatory practices and help flag abuses.

[13/] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; CC Docket Nos. 96-98, 95-185, First Report and Order, FCC 96-325 at ¶¶ 861, 1025, 1094 (rel. Aug. 8, 1996) ("First Local Competition Order") ("Based on the extensive record in the LEC-CMRS Interconnection proceeding, as well as that in this proceeding, we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks, both in violation of section 20.11 of our rules."). See also AT&T Comments, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, filed March 4, 1996, CC Docket No. 95-185, at 8 (noting that AT&T has been able to enter into only one mutual compensation arrangement with a LEC to date).

[14/] See National Association of Regulatory Utility Commissioners ("NARUC"), An Audit of the Affiliate Interests of Pacific Telesis Group, July 1994, at B33-B35 ("NARUC Audit").

Second, anticompetitive cross-subsidization of competitive wireless services with monopoly local exchange and access services remains a very real danger and one that would be substantially more difficult to uncover in the absence of a separate subsidiary requirement. For example, a NARUC Audit found that Pacific Telesis has been misallocating personal communication services ("PCS") expenses to its monopoly telephone business for up to four years.[15/] Notably, Commission itself has also uncovered similar instances of improper cross-subsidization.[16/] The harm from these practices is detrimental both to ratepayers of regulated services and to the competitive landscape for CMRS services.

Neither can reliance on the Commission's price cap rules eliminate either the ability or the incentive for such cross-subsidization.[17/] Not only is the current price caps framework not a "pure" price cap scheme, as it still has a sharing element, but the periodic readjustment of the productivity factor (X-Factor) creates additional incentives to adjust costs to achieve the desired outcome. Moreover, the clear lack of consistency between the federal and various state pricing regimes can facilitate unlawful cost-shifting.

[15/] Id. at B9-B13.

[16/] See e.g., In the Matter of E.T. Kennedy on Request for Inspection of Records, FOIA Control No. 92-229 (rel. Feb. 12, 1996).

[17/] See AT&T Comments, In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, filed August 15, 1996, CC Docket No. 96-149, at 64 n. 56 ("AT&T Non-Accounting Safeguards Comments"); see also AT&T's Opposition to the Four RBOCs Motion to Vacate the Decree, at 71-78 and Affidavit of B. Douglas Bernheim and Robert D. Willig, at 82-86, United States v. Western Elec. Co., Civil Action No. 82-0192 (D.D.C. filed Dec. 7, 1994).

Thus, while the cost allocation and affiliate transaction rules imposed on LECs by the Commission's Joint Cost Order[18/] may help detect or deter some of the more egregious and blatant forms of cross-subsidization, accounting rules alone can never truly guard against the incumbent LECs' ability and incentive to misallocate costs and thereby cross-subsidize their operations in competitive markets.[19/] As one commenter accurately noted, the "Part 64 accounting rules are inadequate to prevent cross-subsidization because they are designed solely to separate the costs of regulated telephony service from the costs of non-regulated activities, but do not provide guidance for the carriers or the Commission on what appropriately constitutes a '[wireless] cost' as opposed to a telephone cost."[20/] NARUC similarly recognized that incumbent LEC practices "have raised doubts regarding the efficacy of . . . non-structural safeguards."[21/] Certainly under these circumstances, there is no basis for eliminating the structural separation requirement that is possibly the most effective

---

[18/] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities; Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) ("Joint Cost Order"), recon., 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom. Southwestern Bell Corporation v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[19/] Significantly, the Commission has recently stated that its Part 64 cost allocation rules cannot always prevent anticompetitive practices such as cross-subsidization. See e.g., Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services, CC Docket No. 96-112, Notice of Proposed Rulemaking, FCC 96-214, at ¶¶ 2, 9 (rel. May 10, 1996).

[20/] Notice at ¶ 106 (citing Cox Comments at i-ii).

[21/] NARUC Audit, supra note 14, at B9.

safeguard against discrimination and cross-subsidization by BOCs engaged in competitive enterprises.

Critically, the decision of the United States Court of Appeals for the Sixth Circuit in Cincinnati Bell Tel. Co. v. FCC does not require the Commission to eliminate such requirements.[22/] In that case, the Court was concerned that the Commission had not explained adequately its decision not to adopt a structural separation requirement for BOC provision of PCS even though such a requirement already existed for cellular services.[23/] Based upon the Commission's determination that incumbent LECs' market power has not diminished since the original institution of the rule, however, the correct response is not to eliminate the rule altogether, but to rationalize its regulatory scheme by extending structural separation to all CMRS provided by incumbent Tier I LECs.[24/] Only when the incumbent LECs' bottleneck control over essential local exchange facilities has dissipated should the Commission remove or reduce the structural separation requirements.

While maintaining structural separation might entail some costs, the benefits of the requirement far outweigh the burdens. This is especially the case because, as the Commission notes, section 601(d) of the 1996 Act, which allows BOCs to market jointly and sell certain landline services together with CMRS, removes "one of the principal 'costs' to

---

[22/] 69 F.3d 752 (6th Cir. 1995) ("Cincinnati Bell").

[23/] Id. at 767-68.

[24/] See Section I.B., infra.

the BOCs of continued compliance with Section 22.903."[25/] Accordingly, absent evidence that market conditions have changed, the Commission should retain this essential safeguard.

B. The Commission Should Extend Existing Structural Separation Requirements to the Provision of All In-Region CMRS

As set forth above, the risks of anticompetitive behavior by the BOCs substantially outweigh any potential benefits that may be achieved through integration. Indeed, as the Commission recognizes in the Notice, other than general claims that these benefits are being denied to them, the BOCs have failed to present any data as to the public interest benefits of integrated operations.[26/] Given the risks of unfair competition and harm to the public interest from improper cost-shifting and other discrimination, the Commission should extend the structural separation requirements to the provision of all in-region CMRS rather than eliminating such an essential safeguard altogether.

Requiring structural separation for BOC provision of all CMRS is consistent with the Commission's long-standing goals of promoting regulatory parity.[27/] The Commission has held on various occasions that all CMRS are competing services or have the potential to

---

[25/] Notice at ¶ 51.

[26/] Id. at ¶ 52. Nor should the Commission be swayed by carriers "plans" to utilize integrated operations. Unless and until-the Commission finds that the public interest will be served thereby, carriers understand that these plans must remain just that.

[27/] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 107 Stat. 312, 392 (1993); Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1418 (1994).

become competing services in the wireless marketplace.[28/] This is especially the case with PCS and cellular, which often are viewed by customers as identical services.

While the Commission reasoned in the Broadband PCS Order that the cellular-PCS cross-ownership restriction generally obviated the need for separate subsidiaries in the context of BOC provision of PCS,[29/] the elimination of the cross-ownership rule changes that analysis. Until recently, LECs, by virtue of their extensive in-region cellular holdings, were generally unable to acquire significant in-region PCS spectrum. In the on-going D-F block auction, however, LECs will be able to purchase up to 20 MHz of PCS spectrum in each cellular market. Thus, the Commission should reconsider its original decision and require Tier 1 LECs to place their PCS operations in structurally separate affiliates. Just as is the case with LEC provision of cellular services, the benefits of structural separation far outweigh the costs for all in-region CMRS.

Even when a BOC provides out-of-region CMRS, a separate affiliate requirement is necessary and appropriate.[30/] Although the competitive dangers of integrated

---

[28/] See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz frequency Band, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, Third Report and Order, 9 FCC Rcd 7988, 7996, 8001-36 (1994); Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Radio Services, First Report, 10 FCC Rcd 8844 (1995).

[29/] Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, 8 FCC Rcd 7700, 7751 n. 98 (1993).

[30/] Cf. Notice at ¶¶ 54-55. The Commission has granted all BOCs an interim waiver of the section 22.903 requirements for out-of-region cellular service. Id. at ¶ 56.

landline/CMRS service are less in areas where the cellular carrier is not interconnecting with the public switched network through that BOC's landline affiliate,[31/] significant concerns about cost misallocation and cross-subsidization still remain. Thus, similar to the Commission's recent requirement with regard to BOC out-of-region interexchange service, BOC provision of cellular, PCS and other CMRS outside their operating territories should be subject to at least a limited separate affiliate requirement.[32/] In that context, the Commission specifically noted the potential for improper cost-shifting and found that any burdens imposed by such a regulatory requirement were outweighed by the risks.[33/] Specifically, the separate affiliate must maintain separate books of account, not jointly own transmission or switching facilities with the LEC, must take tariffed services from the affiliated LEC from a

---

[31/] Id. at ¶ 57.

[32/] See Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21, Report and Order, FCC 96-288, at ¶ 22 (rel. July 1, 1996). ("BOC Provision of Out-of-Region Services Order"). As AT&T previously demonstrated, more stringent separation requirements are needed for a BOC's provision of out-of-region interexchange services. See AT&T Comments and Reply Comments, In the Matter of Bell Operating Company Provision of Out-of-Region, Interexchange Services, filed March 13, 1996 and March 25, 1996, CC Docket No. 96-21. See also AT&T Comments, In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of § 254(g) of the Communications Act of 1934, as amended, filed April 19, 1996, CC Docket No. 96-61, at 24-28.

[33/] BOC Provision of Out-of-Region Servicers Order at ¶¶ 39-40.

as a nonregulated affiliate subject to the Commission's cost allocation and affiliate transactions rules.[34/].

C. The Commission Should Apply Its Safeguards to All Tier 1 LECs Offering CMRS

The Commission tentatively concludes that while the lack of regulatory symmetry between BOC and other incumbent LEC provision of cellular service is problematic, it will not apply section 22.903 to any additional LECs at this time.[35/] Even though it expressly finds that it would be far more consistent to require all Tier 1 LECs to place their cellular operations in separate subsidiaries, the Commission believes that the benefits of imposing the section 22.903 requirements on independent LECs would outweigh the costs.[36/]

AT&T disagrees with this conclusion. All incumbent LECs retain their monopoly status within their operating territories and all possess the same ability to undermine entry by non-affiliated CMRS providers. Thus, until the Commission concludes that a Tier 1 LEC is

---

[34/] Id. at ¶ 2. Although AT&T believes that extension of structural separation requirements to incumbent LEC provision of all CMRS would best foster competition and serve the public interest, should the Commission decide to impose less restrictive requirements on PCS, there is adequate justification for doing so. As noted above, there tends to be substantially more geographic overlap between LEC landline and cellular holdings than between their landline and PCS interests. Because the danger of discrimination and cross-subsidy is much more pronounced when LECs control both landline and wireline facilities in the same region, a decision by the Commission to require a cellular separate subsidiary, even in the absence of a corresponding rule for PCS operations, is reasonable.

[35/] Notice at ¶ 90.

[36/] The Commission has tentatively concluded that its proposed safeguards for LEC provision of in-region PCS should also apply to all Tier 1 LECs providing in-region cellular. Notice at ¶ 91. Although AT&T believes that the current structural separation requirements of section 22.903 provide a much-needed level of protection, it agrees that the PCS safeguards should be applied to all Tier 1 LECs in the event that the Commission chooses not to extend the section 22.903 requirements to all Tier 1 LECs at this time.

non-dominant in the provision of telephone exchange service in a market, such a LEC should be subject to the same regulatory requirements that apply to the BOCs, including strict structural separation. Any costs incurred as a result of such requirements will be far outweighed by the benefits gained.[37/]

As to the non-Tier 1 LECs, the Commission does not propose to impose on them either the section 22.903 requirements or the proposed PCS safeguards. AT&T agrees that if the Commission is concerned about the burden of such requirements on smaller independent LECs, it should apply them solely to Tier 1 LECs, whose substantial resources present the greatest potential for anticompetitive harm.

D. The Commission Should Not Permit BOC Cellular Affiliate Ownership of Landline Facilities Except in Areas Where There is Demonstrated Local Exchange Competition By Non-Affiliated Companies

In the Notice, the Commission proposes amending section 22.903(a), which prohibits a BOC cellular affiliate from owning any facilities for the provision of landline services, to permit the cellular affiliate to own landline facilities for the provision of landline services, including competitive landline local exchange and interexchange service, in the same market

---

[37/] See AT&T Comments, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, filed August 29, 1996 (independent LEC issues), CC Docket No. 96-149. In other contexts, the Commission has determined that regulations should apply to all Tier 1 LECs. See, e.g., Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92-256, Report and Order, 9 FCC Rcd 4922, 4941-42 (1994) (finding that "the benefits of applying ONA requirements and nondiscrimination safeguards to GTE now substantially outweigh the costs involved"); Expanded Interconnection with Local Telephone Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994); 47 C.F.R. §§ 64.1401(a), et seq. (subjecting any LEC classified as a Class A company under 47 C.F.R. § 32.11 that is not a NECA interstate tariff participant to expanded interconnection obligations).

with its affiliate incumbent LEC.[38/] In reaching this tentative conclusion, the Commission suggests that such a rule would benefit the public because these affiliates would then constitute "new" entrants to the local exchange market to provide integrated services without the risk of LEC monopoly cross-subsidization or interconnection discrimination.[39/]

The Commission's proposal is seriously flawed and should be rejected. A BOC affiliate such as Ameritech Communications, Inc. is clearly not a "new entrant," but rather a reincarnation of the very BOC that is conceded to possess substantial market power. If the Commission adopts its proposed rule change, it would enable the BOCs to undermine the very safeguards that are being implemented to protect the public interest.[40/] Such a policy would, in effect, invite competitive abuses generally by providing the BOCs the means to evade critical competitive safeguards.[41/]

Allowing an in-region separate affiliate to own landline facilities while it masquerades as a new local exchange entrant ignores the overarching incentives of the BOC to behave in an anticompetitive fashion. For instance, under such an arrangement, the BOC would have strong incentives to funnel to its affiliate network innovations, such as upgraded software,

---

[38/] Notice at ¶ 58.

[39/] Id. at ¶ 59.

[40/] See AT&T Non-Accounting Safeguards Comments, supra note 17, at 42-43.

[41/] Significantly, Ameritech is not the only BOC that seeks to avoid pro-competitive obligations and requirements through the use of such a structure. Pacific Telesis is seeking to utilize an affiliate, Pacific Bell Communications, to evade the provisions of Section 272 of the Act. See Direct Testimony of Daniel O. Jacobsen (Director of Regulatory and External Affairs, Pacific Bell Communications), In re Pacific Bell Communications Applications for a Certificate of Public Convenience and Necessity, App. No. 96-03-007, at 16, 18 (Cal. PUC filed March 5, 1996).

switches and other facilities that improve service quality, so that competitors dependent on BOC facilities "will find them increasingly obsolete."[42/] Indeed, under such circumstances, the "new entrant" could easily stand in the shoes of its incumbent affiliate, rendering the remaining separate subsidiary requirement meaningless. Accordingly, the Commission should decisively preclude a BOC affiliate from owning both cellular and landline local exchange facilities, just as a BOC itself cannot own both types of plant. Any other conclusion allows outright evasion of the Commission's rules and would hinder, rather than promote, competition.

E. If the Commission Decides to Eliminate the Section 22.903 Requirements, It Should Sunset them Rather than Eliminate them Immediately

The Commission proposes two options for potentially eliminating its section 22.903 requirements: (1) retaining streamlined separate affiliate and nondiscrimination requirements for BOC in-region cellular service, but sunsetting these requirements once a BOC is authorized to provide interLATA service in any in-region state;[43/] or (2) eliminating immediately the section 22.903 requirements in favor of the uniform safeguards for LEC provision of CMRS that the Commission proposes in Section VI of the Notice.[44/]

Although AT&T urges the Commission to retain its existing structural separation requirements, if the Commission decides to eliminate these requirements, it is vital that it do

---

[42/] Comments of Teleport Communications Group, Inc., Implementation of the Non-Accounting Safeguards, filed Aug. 15, 1996, CC Docket No. 96-149, at 5 (quoting staff comments, p. 8, Application of Ameritech Communications of Wisconsin, Inc. for Certification as a Telecommunications Carrier, 139 NC-100 (June 5, 1996)).

[43/] Notice at ¶¶ 79-81.

[44/] Id. at ¶¶ 82-83.

so gradually. The flash cut advocated by the BOCs would allow the telephone companies to engage in anticompetitive conduct without detection before the onset of meaningful competition in the local exchange marketplace. The public interest would be promoted most effectively through a gradual elimination of section 22.903.

Under a transitional approach, the Commission should sunset the effectiveness of section 22.903 for a particular BOC contemporaneously with its sunset of the structural separation requirement for BOC provision of in-region interLATA services, rather than in tandem with the BOC's initial receipt of interLATA authorization. Under section 272(f) of the Communications Act, a BOC must utilize a separate subsidiary for the provision of interLATA services and manufacturing activities for three years after the date the BOC is authorized to provide interLATA telecommunications services unless the Commission extends the requirement.[45/] This transition period reflects Congress' recognition that grant of interLATA authority alone may not coincide with market conditions that adequately protect against discrimination and cross-subsidization. Moreover, because section 272(f) permits the Commission to lengthen the automatic three-year transition period if the public interest so warrants, the Commission will have to conduct a comprehensive review of the remaining potential for BOCs to disadvantage their competitors prior to sunset of the interLATA separate subsidiary requirements. The findings made in that study would be applicable to BOC provision of CMRS. Thus, the Commission should revise its sunset proposal to

[45/] 47 U.S.C. § 272(f).

provide for a simultaneous sunset of the interLATA and CMRS separate subsidiary requirements.[46/]

Finally, it is premature to consider sunsetting any non-structural safeguards that may be adopted by the Commission in lieu of the structural separation.[47/] At this point, the Commission has no information on the potentially adverse impact of eliminating the structural rules and, thus, can make no reasoned decision about the proper time to sunset supposedly alternative rules. This decision should be left to a future rulemaking when the Commission and the industry can assess the state of competition in the CMRS and local exchange marketplaces.

F. The Commission Retains the Authority to Impose Appropriate Competitive Safeguards on BOC Provision of Incidental InterLATA CMRS

The Commission determined that sections 271(a)(3) and (g)(3) of the Act immediately authorize BOC provision of in-region, incidental interLATA services, including CMRS, without separate affiliates.[48/] The Commission correctly finds that this does not limit its authority to retain current BOC cellular structural separation rules or to prescribe alternative rules if it determines that such rules are an appropriate competitive safeguard.[49/] AT&T agrees that the Commission is empowered by other provisions of the 1996 Act to impose safeguards to prevent anticompetitive behavior by the BOCs with respect to the provision of

---

[46/] If the Commission decides to extend its structural separation requirement to all Tier 1 LECs, it should retain that requirement for at least three years subject to extension by the Commission for a longer period if the incumbent LEC's landline monopoly has not eroded.

[47/] Notice at ¶ 125.

[48/] Id. at ¶ 84.

[49/] Id. at ¶ 86.

incidental services. Specifically, section 271(h) requires the Commission to "ensure" that a BOC's provision of incidental services "will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."[50/] Although the Commission is not required to impose separate affiliate requirements for the provision of incidental services, it may do so if it is necessary to preserve competition.

II. THE COMMISSION SHOULD IMPOSE ADDITIONAL NONDISCRIMINATION SAFEGUARDS TO DETECT AND PREVENT ANTICOMPETITIVE CONDUCT

As demonstrated above, structural separation for all CMRS should be the primary mechanism to safeguard against anticompetitive practices by incumbent Tier 1 LECs. To ensure more fully that the goal of open and fair competition among CMRS providers is served, the Commission should also impose additional nondiscrimination safeguards to address the manner in which the BOC and its affiliate undertake joint marketing pursuant to section 601(d) of the 1996 Act, the obligations regarding the use of CPNI, the disclosure of network information, and the enforcement of accounting safeguards.

A. The Commission Should Define and Regulate Joint Marketing Practices to Promote Robust Competition

The Commission finds that integrated sales and marketing of resold cellular and incumbent LEC landline service are permitted by section 601(d) of the 1996 Act.[51/] The Commission proposes that joint marketing that is undertaken by a BOC on behalf of its

---

[50/] 47 U.S.C. § 271(h).

[51/] Notice at ¶¶ 61, 63.

affiliate be subject to affiliate transaction rules and classified as a non-regulated activity and be conducted on a compensatory, arms-length basis.[52/]

At a minimum, the separate affiliate should be required to purchase marketing services from the BOC on an arm's length basis. In no event, however, should such arrangements extend beyond marketing and involve the affiliate and the BOC in the development and planning of joint services. To ensure a level competitive playing field, the Commission should also require that all entities offering service similar to the BOC CMRS affiliate be permitted to market and sell the BOC's local exchange service. This requirement, similar to the requirements of section 272(g)(1),[53/] is a critical component of competitive fairness. In addition, a BOC and its affiliate that intend to market jointly should be required to announce the availability and terms of any such arrangement at least three months prior to implementing it, to prevent an affiliate from having a discriminatory "first move" advantage over unaffiliated carriers. The Commission should mandate public disclosure of the terms and conditions upon which such services are provided to promote effective enforcement of these requirements.

Finally, AT&T does not believe that section 22.903's current prohibition on joint installation, maintenance, and repair of BOC cellular and landline service is affected by

---

[52/] Id. at ¶ 64.

[53/] 47 U.S.C. § 272(g)(1). To the extent a section 272 affiliate also provides CMRS, section 272 itself would apply fully.

section 601(d)'s authorization of joint marketing. Consequently, such prohibition remains in effect and Commission should continue to proscribe such activities.[54/]

B. The Commission's Existing CPNI Rules Are Not Inconsistent With the New CPNI Requirements of the 1996 Act

The Commission tentatively concludes that new section 222 of the Communications Act regarding CPNI does not prohibit the Commission from enforcing additional requirements that are not inconsistent with this new provision.[55/] The Commission accordingly seeks comment on whether its part 22 CPNI rules are consistent with section 222 of the Act and whether it should eliminate them even if they are not inconsistent.[56/]

Section 22.903(f) of the Commission's rules is not inconsistent with section 222 of the the Act.[57/] Section 22.903(f) protects against discrimination by requiring that BOC CPNI disclosed to its cellular affiliate is likewise made available on the same terms to carriers not

---

[54/] The Commission seeks comment on the effect of the joint marketing authorization on billing and collection activities. Notice at ¶ 68. The Commission tentatively concludes that the reasoning of its Billing and Collection Order remains valid and that structural separation requirements do not need to be extended to proscribe joint billing. Id. (citing Detariffing of Billing and Collection Services, 102 FCC 2d 1150 (1986), aff'd on reconsideration, 1 FCC Rcd 445 (1986)). AT&T does not oppose joint billing so long as costs are properly allocated and BOC billing services are available to other providers on the same terms and conditions as apply to the CMRS affiliate.

[55/] Notice at ¶ 72.

[56/] Id.

[57/] See AT&T Comments In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, filed June 11, 1996, CC Docket No. 96-115, at 5-11. Because sound legal and policy analysis dictates that the Commission define "telecommunications service" as used in section 222 of the Act to mean all basic transmission services, including local, toll and CMRS, the Commission should conclude that CPNI gained from one service can be utilized for other basic services.